LAW OFFICE OF MITCHELL KHOSROVA

Date: May 1, 2017

To: Lisa Kenneally, Chair Hudson ZBA and all Hudson ZBA Members

From: Mitchell Khosrova, Assistant City Attorney

Re: Appeal of CEO Issuance of an Order To Remedy ("OTR") of Colarusso Replacement of Bulkhead dated January 24, 2017

As you are aware the ZBA received an Appeal Application dated February 15, 2017 for the above referenced OTR. The application contained a legal memorandum from John J. Privitera, Esq. dated January 24, 2017 (the same date as the OTR) and an Affidavit if Michael Heffner, Jr. dated February 14, 2017.

The thrust of the legal memo was that: (1) the replacement of the bulkhead was a "minor repair" and therefore no Hudson Planning Board ("HPB") review is required and (2) that there is no need to obtain said review since other agencies already conducted SEQRA and the work cannot be undone.

Argument 1- Minor Repairs

A. The applicant seeks to be exempt from review by claiming that the work done was merely a "repair" and therefore a Minor Action under Code § 325-42. But a repair only constitutes a "minor action" if it is a repair "**involving no substantial changes** in an existing structure or facility." (§ 325-42). Clearly, the Code Enforcement Officer should be upheld in his judgment that replacing a wooden structure capped with concrete with a far more durable steel structure constitutes a substantial change. This determination is corroborated by the NYS DEC. Notably, the NYS Department of Environmental Conservation was lead agency under SEQRA and the DEC determined the proposed action was an Unlisted Action rather than a Type II action. Under the SEQRA Rules, "repair involving no substantial changes in an existing structure or facility" (the *exact* same wording as the Hudson Code) is expressly classified as a Type II action. (6 CRR-NY 617.5). If the applicant's project had been "repair involving no substantial changes in an existing structure or facility", lead agency DEC would have been required to have treated it as a Type II action. The fact that DEC designated the project an Unclassified action and *not* a Type II action shows that the project was not "repair involving no substantial changes." At minimum, the substantial change from wood/concrete to steel makes this exemption inapplicable.

B. As I stated during the April 19 ZBA meeting, the applicant themselves repeatedly and over time differentiated between their work of "repair the soil erosion" and

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"replacement of the bulkhead". The EAF submitted by the applicant for SEQRA review stated the following: "Project consists of two parts—the south end of the existing bulkhead has eroded from severe storms, the plan is the rapir (sic) this. The second part of the project consists of replacing a failing bulkhead on the north end of the property." The two terms—"repair" and "replacement"— are not used interchangeably in multiple documents submitted by the applicant and it is rather disingenuous for applicant to now claim the two terms are identical.

Counsel for applicant relies further on the definition of Minor Action in Code §325-42. His interpretation that a "replacement" is a Minor Action is, at best, misplaced. The Code specifically states that only a replacement "in kind" constitutes a Minor Action. That is not the facts here and this provision is inapplicable. It is self-evident that **replacing wood and concrete with steel is not an "in kind" exchange**. Certainly a steel bulkhead extends the life of the asset so it cannot be an ordinary repair and is a "replacement, alteration, improvement" per the below definition. Just as in "A.", above, under the SEQRA Rules, "replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site…" (again, the *exact* same wording as the Hudson Code) is expressly classified as a Type II action. (6 CRR-NY 617.5). If the applicant's project had been "replacement, rehabilitation or reconstruction of a structure or facility, in kind", DEC would have been required to have treated it as a Type II action. The fact that DEC designated the project an Unclassified action and *not* a Type II action shows that the project was not "replacement, rehabilitation or reconstruction of a structure or facility, in kind", either.

Internal Revenue Bulletin: 2012-14; April 2, 2012; T.D. 9564; *Guidance Regarding Deduction and Capitalization of Expenditures Related to Tangible Property* includes the following language:

"The United States Supreme Court has recognized the highly factual nature of determining whether expenditures are for capital improvements or for ordinary repairs. *See Welch v. Helvering*, 290 U.S. 111, 114 (1933) ("decisive distinctions [between capital and ordinary expenditures] are those of degree and not of kind"); *Deputy v. du Pont*, 308 U.S. 488, 496 (1940) (each case "turns on its special facts"). Because of the factual nature of the issue, the courts have articulated a number of ways to distinguish between deductible repairs and non-deductible capital improvements. For example, in *Illinois Merchants Trust Co. v. Commissioner*, 4 B.T.A. 103, 106 (1926), acq. (V-2 C.B. 2), the court explained that repair and maintenance expenses are incurred for the purpose of keeping property in an ordinarily efficient operating condition over its probable useful life for the uses for which the property was acquired. Capital expenditures, in contrast, are for <u>replacements, alterations, improvements</u> (emphasis added), or additions that appreciably prolong the life of the property, materially increase its value, or make it adaptable to a different use. In *Estate of Walling v. Commissioner*, 373 F.2d 190, 192-193 (3rd Cir. 1966), the court explained that the relevant distinction between capital improvements and repairs is whether the expenditures were made to "put" or "keep"

property in efficient operating condition. In *Plainfield-Union Water Co. v. Commissioner*, 39 T.C. 333, 338 (1962), nonacq. on other grounds (1964-2 C.B. 8), the court stated that if the expenditure merely restores the property to the state it was in before the situation prompting the expenditure arose and does not make the property more valuable, more useful, or longer-lived, then such an expenditure is usually considered a deductible repair. In contrast, a capital expenditure is generally considered to be a more permanent increment in the longevity, utility, or worth of the property."

Additionally, Hudson City Code §325-17.1 specifically states that HPB review is triggered if any "improvement thereon be constructed, altered, paved, improved or rebuilt" (emphasis added).

People v. Melchner, 4 Misc.3d 132(A) (2004), 791N.Y.S.2d 872, 2004 N.Y. Slip Op. 50727(U) from the Appellate Term, 2 Dept. is a case on point. The defendant purchased property and "he inspected the property and realized that the entire wharf and walkway needed to be replaced. As a result, the entire dock and a significant portion, if not all, of the walkway was removed and a completely new wharf constructed." The court determined that this was more than repair and required the defendant to obtain site plan approval from the planning board.

These facts are almost identical to our matter and HPB review is mandated.

C. The applicant also argues that the project was too small to be reviewed, citing a Code provision addressing "construction or expansion" of up to 4,000 square feet. Applicant glosses over the express requirement that for this to be applicable, the construction or expansion must be "consistent with local land use controls." Whereas this project involves a use that is expressly "non-conforming", construction or expansion is *inherently inconsistent* with such land use controls. This provision provides no basis to exempt applicant's project from review. Furthermore, and again, as in "A." and "B.", above, the language in the Hudson Code is *identical* to the language in the SEQRA Rules, and DEC's classification of the project as "Unclassified" and *not* Type II is a plain rejection of applicant's contention that it qualifies as a minor action.

D. Finally, applicant's attempt to invoke a "minor action" exemption is fundamentally off-base. The relevant section of the Hudson Code provides that the dock operation "may continue to operate as a nonconforming use until such time as one or more of the actions ***or events*** specified above is proposed to be undertaken." It is perfectly clear that the inclusion of the term "events" includes the occurrence or happening of one of the specified things, apart from, and in addition to, whether it may fall within the scope of a defined type of "action". At every level, applicant's attempts to avoid review are misguided and erroneous, and should be rejected.

Argument 2- No Need for Planning Board Approval

A. For arguments sake, I will concede that the HPB will not need to do additional SEQRA in regard to the replacement of the bulkhead but this would not mean that additional review would not be appropriate or permitted.

   Troy Sand & Gravel v. Fleming et al, Supreme Court County of Rensselaer Decision &n Order, Index No. 251240 dated July 13, 2016 is decisive and under our Code provision §325-17.1(D)(1), the HPB has authority of review and "shall impose special conditions on such use as may be necessary to protect the health, safety and welfare of residents living in close proximity to commercial docks and the public while recreating and using public facilities in close proximity to commercial docks . . ."

   The *Troy Sand Gravel* case specifically states that the issuance of a DEC mining permit does not prevent the local government "from enacting or enforcing local laws or ordinances of general applicability" that do not directly 'regulate mining or reclamation activities'", see page 5. The HPB authority to impose special conditions is not in any manner attempting to regulate mining activities.

   The case also holds that any special use permit standards that require the planning board to consider the "health, safety, welfare" of the public requires the applicant to demonstrate to the board's satisfaction that the use satisfies all the necessary requirements, see page 11. In that case, the Court found that the applicant's "endeavor of the magnitude proposed was not compatible with the Code restrictions, see page 17.

Although I may be in agreement that the state would not allow the City to compel removal of the new steel bulkhead- that is not the point. There is clearly the concurrent authority of the City to ensure that any Code provisions applicable to the use of land are applied and complied with. Even if an applicant obtains a vested interest in completed work, the applicant must still comply with any obligations that arise as a result of doing such work. Therefore there is simply no rational basis for the Hudson CEO's OTR to be overturned and applicant must submit an application for the replacement of the bulkhead to the HPB for review as the Code requires.